United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

253

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,841

UNITED STATES OF AMERICA, Appellee,

v.

ROY THOMAS, Appellant.

IN FORMA PAUPERIS APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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INDEX

TABLE OF AUTHORITIES

*Cases principally relied on.

Index Continued

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QUESTIONS PRESENTED

1. Are inconsistent not guilty and guilty verdicts grounds for reversal where the jury instructions (particularly the verdict form) permitted the inconsistency to occur?

2. Was there any evidence to sustain the manslaughter count which was submitted to the jury?

To the best of counsel's knowledge, this case has not previously been before this Court under the same or a similar title.

REFERENCE TO PARTIES AND RULINGS

In compliance with the local Rule 8(e) of this Court, reference is made to the Trial Judge's instructions to the jury, the verdict form submitted to the jury, and the failure of the Trial Judge to set aside the jury verdicts. The Trial Judge was the Honorable John Lewis Smith, Jr.

STATEMENT OF THE CASE

Appellant was indicted for first degree felony-murder (count 1), manslaughter (count 2) and robbery (count 3). The trial was held on July 22-24, 1970, before the Honorable John Lewis Smith, Jr. and a jury.

Leonard G. Leading Fox, an employee of the Bureau of Indian Affairs, testified that on the evening of March 5, 1970, he met a George Kane for dinner and drinks (Tr. 96). They met at approximately 8:45 p.m. and separated at about 1:00 a.m. in the morning after spending the evening drinking beer and highballs.

Eddie Devone testified that at about 1:30 a.m. that morning he and a female prostitute friend named Nu Nu left an apartment at the corner of 14th and P Streets, N. W. (Tr. 181). Across the street from the apartment house as they left was a man identified as George Kane (Tr. 116). Devone was approached by Kane, who seemed to be drunk

(Tr. 181, 188). Eddie Devone admitted that he was a homosexual male prostitute, a female impersonator, a narcotics addict who would "shoot about twenty pills" a day, and a hustler (Tr. 194-197, 200). On the evening in question, he had about "four caps" of heroin (Tr. 200). When Kane approached Devone that evening, Devone was dressed and gave the appearance of a female (Tr. 220). Kane proposed to Devone "to have some fun" (Tr. 183). Devone asked Kane to wait and then reentered the apartment building to go up to his fourth floor apartment to clear the way (Tr. 183). On the way up he met Michael Singleton and appellant, Roy Thomas, on the third floor landing coming down (Tr. 183). Devone told them he was bringing a friend up and to cut out the light (Tr. 183). Devone went back downstairs and asked Kane for twenty dollars. Kane handed him a twenty dollar bill, but Devone then changed his mind about taking him upstairs. Devone and Nu Nu, the female prostitute who was still present, ran off with the twenty dollars to Corcoran Street to buy narcotics (Tr. 183).

Michael Singleton testified that at the time in question he and the appellant, Roy Thomas, did meet Eddie Devone on the third floor landing as he was coming upstairs (Tr. 121). They were going downstairs "to hustle" together (Tr. 120). Devone told them to turn out the light because

he was going to bring someone up. Devone went back downstairs and Singleton and appellant turned out the light (Tr. 121). They waited for Devone to return, but when he did not they proceeded downstairs. When they reached the street level, appellant said he saw Devone and Nu Nu running up the alley with the money (Tr. 121-122). Appellant allegedly sent Singleton back upstairs to get appellant's coat and then went outside to talk to Kane (Tr. 150). When Singleton came back downstairs again and went out the door, he allegedly saw the follow-through of appellant hitting Kane with his left hand (Tr. 125, 152). Kane fell to the ground, and appellant allegedly went through his pockets and took some change (Tr. 125). Singleton and appellant then followed Devone and Nu Nu to Corcoran Street where they attempted to find out how much money Devone and Nu Nu had taken from Kane (Tr. 125, 128-129). Devone testified that appellant told them not to go back to 14th and P because the police might be there and that later appellant admitted to having hit Kane, but that Kane had had only sixty cents in his pocket (Tr. 185-186). Singleton admitted that at the time he was a narcotics addict using heroin, cocaine and bam, that he was a hustler, a con artist, a pickpocket, a shoplifter, and that he had gotten a grant from Phillip Stern's family foundation to lecture on drugs, but merely

used the money to feed his own habit when he was not hustling (Tr. 132-136).

George Kane died from the injury which occurred when his head hit the ground (Tr. 205-207).

Appellant, Roy Thomas, took the stand and testified to facts similar to those above except that he stated that he went back upstairs for his own coat, and that when he came back downstairs, Singleton was running up 14th Street to Corcoran Street saying "Come on, Jack, the police are coming" (Tr. 288). Appellant denied that he had hit Kane, denied that he had taken any money from him and denied that he had told Devone that he had (Tr. 292).

The jury returned a verdict of not guilty of felony-murder and guilty of manslaughter and robbery. Appellant was sentenced to two three to twelve-year concurrent sentences.

ARGUMENT

I. The Inconsistency Of The Jury Verdicts, Especially Where The Jury Instructions Permitted The Inconsistency, Is Reversible Error.

In this case involving a single event, the jury found appellant not guilty of first degree felony-murder (count 1)—i.e., a finding that appellant did not kill a man while committing robbery. In conflict, the jury also found appellant guilty of manslaughter and robbery (counts 2 and 3)—i.e., a finding that appellant did kill a man while committing robbery.

Because of these inconsistent verdicts and because the trial judge's instructions permitted the inconsistency to arise, the Court should reverse.

Since Dunn v. United States, 284 U.S. 390 (1932), the general rule has been that inconsistent criminal jury verdicts are not grounds for reversal so long as there was sufficient evidence to sustain the guilty verdicts actually returned. Jackson v. United States, 114 U.S. App. D. C. 181, 313 F. 2d 572 (1962).[1/]

[1/] Although the Dunn rule has generally been formulated as broadly as stated in the text, the precise rule was that the inconsistent verdicts could stand only if the not guilty count could not have been pleaded as res adjudicata if the guilty count had been tried separately. If that narrow rule were applied to the instant case, then reversal would probably be required because it is speculative at best whether this Court would permit a separate trial for robbery and manslaughter following a verdict of not guilty to the charge of felony-murder. See Fuller v. United States, 407 F. 2d 1199, 1225 n. 19 (D.C. Cir. En Banc, 1968), indicating doubt that there could be a second-degree murder trial following a verdict of not guilty to first-degree murder.

Because of developments in the law in the thirty-nine years since Dunn and because the inconsistency in the verdict could easily have been avoided with proper jury instructions, it is submitted that the Dunn rule should not be followed.

First, in recent years, the Courts have repeatedly held that two inconsistent guilty verdicts constitute reversible error. For example, a conviction for stealing government property and for receiving stolen government property was reversed in Milanovich v. United States, 365 U.S. 551 (1961). If two inconsistent guilty verdicts are grounds for reversal, it should follow a fortiori that inconsistent not guilty and guilty verdicts are grounds for reversal.

Second, inconsistent not guilty and guilty verdicts rendered by a judge without a jury constitute reversible error. United States v. Maybury, 274 F. 2d 899 (C.A. 2, 1960). The Maybury case suggested that the Dunn rule, which ignores inconsistencies in jury verdicts, might be the "price" a defendant has to pay for exercising his Sixth Amendment right to a jury trial. It is submitted that a defendant never has to pay a "price" for a jury trial. United States v. Jackson, 390 U.S. 570, 581-583 (1968). This Court should hold that the inconsistent verdicts, as in Maybury, are grounds for reversal regardless of the fact that this appellant elected a jury trial. "Inconsistent Verdicts In a Federal Criminal Trial," 60 Col. L. Rev. 999, 1007-1009 (1960).

Third, inconsistent jury verdicts in a civil trial constitute reversible error. E.g., Cheney v. Moler, 285 F. 2d 116 (C.A. 10, 1960), and cases cited in Moore's Federal Practice (2nd Ed. 1966), § 59.08[4] at n. 72, 74, 63. If a party to a civil trial is entitled to protection against an inconsistent jury verdict, it should follow a fortiori that the appellant in a criminal trial is entitled to similar protection.

It is too easy in a case of this kind to view the result as an exercise of jury leniency. The inconsistent verdicts may, with equal probability, have resulted from a compromise or a misunderstanding of the law or the facts. To the extent a jury is permitted to compromise, it deprives a criminal defendant of a most cherished right—namely, the right to a unanimous verdict. That right is particularly endangered in a case such as this where the prosecution's evidence is based solely on the very tenuous credibility of its two witnesses—Singleton and Devone. Thus, in this case some of the juror's might not have believed Singleton and Devone—in which case appellant was entitled to complete acquittal. But because of the compromise possible in a "lenient" inconsistent verdict-appellant lost the right to insist that those jurors either stand firm in their belief or face up to the full consequences of changing their belief.

Thus, the so-called leniency represented by compromise-inconsistent verdicts is in fact no leniency at all. Of course, if there was no compromise but merely a misunderstanding or disregard for the facts and law, the situation is even worse.

In each of the three similar situations cited above at pages 7-8, an appellant was entitled to insist on the protection of consistent verdicts. This Court should also so hold here.

It has been stated above that the Trial Court's instructions permitted the inconsistent verdicts in this case. Although the trial judge submitted a verdict form to the jury, the verdict form did not indicate the permissible alternative verdicts which the jury could return (except on the death penalty question). There is set forth below a very simple verdict form which would have eliminated the problem:[2/]

[2/] If Point II, *infra*, with respect to the manslaughter count is sustained, all references to manslaughter would be eliminated, verdict # 3 would be eliminated, and verdicts # 4 and # 5 would be the same.

Circle One Verdict No.	Unanimous Verdict
1.	Not Guilty of Robbery, Felony-Murder, and Manslaughter
2.	Not Guilty of Felony-Murder and Manslaughter Guilty of Robbery
3.	Not Guilty of Robbery and Felony-Murder Guilty of Manslaughter
4.	Not Guilty of Manslaughter Guilty of Robbery and Felony-Murder
5.	Guilty of Robbery, Felony-Murder and Manslaughter.

If either Verdicts 4 or 5 are rendered, the jury shall circle one of the following with respect to punishment.

Circle One

(a) The jury unanimously recommends that the penalty of life imprisonment be imposed.

(b) The jury unanimously recommends that the penalty of death be imposed.

(c) The jury is unable to agree upon a recommendation for punishment.

In summary, it is submitted that the inconsistent verdicts and the instructions to the jury (particularly the verdict form) which permitted such verdicts constitute reversible error for the reasons stated.

II. There Was No Evidence To Support The Manslaughter Count.

The evidence in this case, resolving all facts against appellant, would indicate that appellant hit the victim with his fist in order to rob him and that the victim fell backwards and ultimately died from the injury suffered when his skull hit the street. There is no other version of the alleged occurrence in the record. If the jury unanimously believed this version, appellant should have been found guilty of first degree felony-murder. On the other hand, if the jury did not unanimously believe that version, then appellant was entitled to a not guilty verdict on all homicide charges. Instead, the jury found appellant guilty of manslaughter.

It is submitted that there is no evidence to support the manslaughter conviction, that it was in error to submit it to the jury, and that this Court should accordingly reverse appellant's manslaughter conviction.

In Green v. United States, 95 U.S. App. D.C. 45, 218 F. 2d 856 (1955), the defendant was found guilty at the trial of arson and second degree murder of a woman killed by the fire. This Court reversed holding that the defendant was either guilty of first degree felony-murder or not guilty of any homicide at all and that it was error for the trial judge to instruct on second degree murder as a lesser included offense.

In contrast, in Jackson v. United States, 114 U.S. App. D.C. 181, 313 F. 2d 572 (1962), the defendant was found guilty at the trial of robbery and second degree murder of the robbery victim. This Court affirmed. Jackson cited Green, but did not overrule it or provide any explanation of how the two cases could stand together.

This Court's most recent reference to the problem reaffirms the rule in Green. In Fuller v. United States, 407 F. 2d 1199 (D.C. Cir. En Banc, 1968), this Court stated at page 1226, n. 25:

> "Where on the facts of the case the defendant as a matter of law must be guilty of first degree murder if he killed, he may insist that the verdict be guilty of first degree murder or not guilty. Green v. United States, 95 U.S.App.D.C. 45, 218 F.2d 856 (1955), but this rule finds its justification in a fear of a compromise verdict of guilty of second degree murder, even though the jury was not unanimously convinced beyond a reasonable doubt that defendant committed the homicide."

As indicated from this quotation from Fuller, the Green problem which potentially subjects a defendant to a compromise verdict in derogation of his Constitutional right to a unanimous jury verdict is similar to the problem of permitting an inconsistent compromise jury verdict to stand. There was no evidence of manslaughter, and it was reversible error for the trial judge to permit the jury to compromise on the felony-murder charge by bringing in a manslaughter verdict.

If the possibility of a compromise had been eliminated, those jurors wanting to compromise might well have found the testimony of Devone and Singleton to lack sufficient credibility for a felony-murder conviction.

For the reasons stated, this Court should reverse the manslaughter conviction for insufficient evidence. Green v. United States, supra.

III. The Disposition Of This Case.

If the Court should sustain either or both of contentions I and II above, the ultimate disposition of this case presents difficult problems.

First, it is clear that appellant cannot be retried on the first degree felony-murder count because of the prohibition against double jeopardy. The second Green case so held. United States v. Green, 355 U.S. 184 (1957). For the same reason, if Point II should be sustained because the Court holds there was insufficient evidence of manslaughter, the defendant cannot be retried on the manslaughter count.

Second, if the Court sustains appellant's position in Point I above that the inconsistent verdicts constitute reversible error, then both the robbery and manslaughter convictions must be vacated. The not guilty verdict on the felony-murder count is a finding that appellant did not commit homicide in the course of a robbery. Because it is not now possible to tell whether the jury rejected the homicide or the robbery elements, both the inconsistent robbery and manslaughter guilty verdicts must be vacated. Milanovich v. United States, 365 U.S. 551, 554-556 (1961).

Finally, assuming the robbery and manslaughter verdicts are set aside because of the inconsistent verdicts,

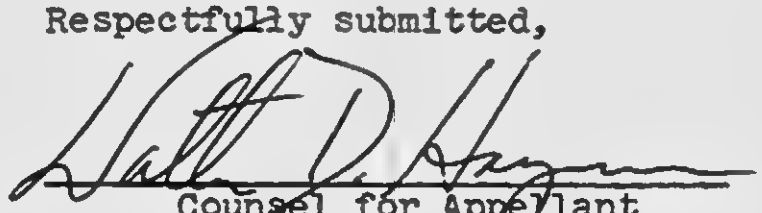
the question remains whether the felony-murder not guilty verdict can be pleaded as collateral estoppel in any retrial on the robbery count (and manslaughter count, if Point II is rejected). It is submitted that in any retrial, appellant can plead the not guilty verdict as collaterally estopping the government from attempting to prove any facts which are inconsistent with all facts deemed found in appellant's favor by the not guilty verdict. In other words, the government cannot again attempt to prove that appellant robbed Kane and killed him in the process. Proving such facts would fly in the face of the not guilty verdict to felony-murder and is barred by collateral estoppel. United States v. Simon, 225 F. 2d 261 (C.A. 3, 1955). In that case, the defendant was charged with receiving goods known to be stolen and with possession of such goods three days later. At the first trial, defendant was acquitted of receiving, but convicted of possession. The guilty verdict was set aside and on retrial for possession of goods known to be stolen, the government again attempted to prove the known-to-be-stolen element by proving such knowledge at the time of receipt. The Court held the not guilty verdict on the receiving count estopped the government. To the same effect is Chief Judge Lumbard's dissenting opinion in United States v. Maybury, 274 F. 2d 899 at 906 (C.A. 2, 1960). "Inconsistent Verdicts in a Federal Criminal Trial," 60 Col. L. Rev. 999, 1011-1014 (1960).

It is, of course, true that application of the doctrine of collateral estoppel will impede a subsequent prosecution of appellant. But that is no reason for not applying it. Collateral estoppel always impedes subsequent prosecutions. It is submitted that the doctrine is clearly applicable and that appellant is entitled to its protection.

CONCLUSION

For the reasons stated, the Court is asked to grant the relief requested.

Respectfully submitted,



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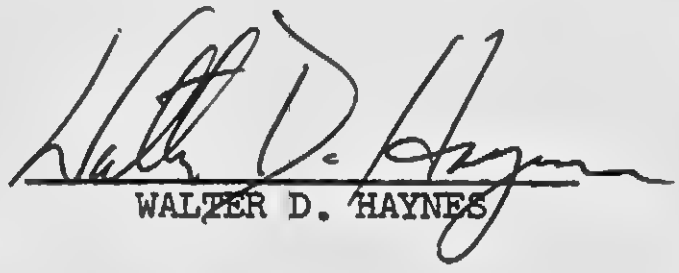
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been delivered by hand to the Office of the United States Attorney for the District of Columbia this 16 day of April 1971.



WALTER D. HAYNES

APPENDIX

District of Columbia Code (1967 Edition):

§ 22-2401. Murder in the first degree—Purposeful killing—Killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 798; June 12, 1940, 54 Stat. 347, ch. 339.)

§ 22-2405. Punishment for manslaughter.

Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 802.)

§ 22-2901. Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 810.)

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,841

UNITED STATES OF AMERICA, APPELLEE

v.

ROY THOMAS, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
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Cr. No. 560-70

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether a verdict of not guilty on a charge of felony murder and a verdict of guilty on charges of manslaughter and robbery are, under the instant facts, inconsistent; and, if so, whether the latter verdicts compel a reversal of the convictions where the inconsistent verdict was allegedly precipitated by erroneous instructions by the trial court?

II. Whether there was sufficient evidence to sustain a conviction of involuntary manslaughter?

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* This was not previously before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed March 31, 1970, appellant was charged with felony murder (22 D.C. Code § 2401), manslaughter (22 D.C. Code § 2405), and robbery (22 D.C. Code § 2901). On July 22, 23 and 24, 1970, trial was held before the Honorable John Lewis Smith, Jr., sitting with a jury, at the conclusion of which appellant was found guilty of manslaughter and robbery and not guilty of felony murder. On October 28, 1970, appellant was sentenced to concurrent prison terms of three to twelve years on both the manslaughter and robbery convictions. This appeal followed.

The Offense

Shortly before 1:00 o'clock on the morning of March 6, 1970, Mr. Leonard G. Leading Fox, employed by the Bureau of Indian Affairs, and a fellow Indian, George Kane (the deceased), parted company at 18th and G Streets, N.W., after having spent the preceding three hours over dinner and drinks (Tr. 96-99). At about this same time, in a fourth-floor apartment at 1317 Rhode Island Avenue, N.W., were gathered four local citizens. The first of the four was Michael Singleton, age 22, a self-proclaimed junkie, pickpocket, booster, professional "hustler,"[1] and part-time guest lecturer[2] (Tr. 135-137). With Singleton was appellant, Roy Thomas, a fellow hustler and heroin addict. Also present was Eddie DeVone, age 27, a dope addict, hustler, homosexual male prostitute, and part-time female impersonator. DeVone was known to his friends as "Faggie" (Tr. 141, 194). Last, there was "Nu Nu," a lady of the evening, referred to by her associates as "the whore" (Tr. 125).

At approximately 1:30 o'clock that morning, Singleton and appellant were getting ready to go out on the street to hustle together (Tr. 120). A few minutes earlier, Nu Nu, wearing a dress, and DeVone, attired in a dress and wig,[3] had left the apartment. Their destination was 1311½ Corcoran Street, N.W., where they intended to purchase some narcotics (Tr. 183-184, 218, 289). No sooner had they exited from the apartment building

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[1] Singleton testified, "Anything that is against the law that gets you money is 'hustling'" (Tr. 135).

[2] Singleton also testified that under a grant from the Stern Foundation he received $175 per week to lecture on the evils of drugs. He admitted, however, that he used the money to support his own habit ($50 to $100 per day) when he was not hustling (Tr. 133-134).

[3] While appellant and Singleton testified that DeVone was wearing a dress, DeVone testified he was wearing rolled-up jeans, no socks, tennis shoes and a blue windbreaker. However, DeVone stated that with his long hair he gave the appearance of a female (Tr. 188, 220).

when a gentleman across P Street[4] beckoned to them. They stopped and observed the potential "trick"[5] cross P Street and approach them. He was dressed in a suit (Tr. 101) and had long straight black hair.[6] He also appeared to be intoxicated (Tr. 219). This man, who was the decedent, George Kane, asked DeVone if "she" would like to have some fun. DeVone requested a *quid pro quo*, and Kane produced a twenty-dollar bill. Telling him to wait, DeVone reentered the building, approached appellant and Singleton who were now on the third-floor landing decending the stairs, and told them to turn out the light because he was bringing up a customer. They obliged. DeVone returned immediately to his trick, but not before deciding on a change of plans. While Nu Nu, DeVone, and the decedent were standing at the doorway, DeVone asked for and received from the unsuspecting victim the twenty-dollar bill. Immediately Nu Nu and DeVone dashed down the alley, absconding with the money (Tr. 183-184, 224-225).

In the interim appellant and Singleton, who had been waiting on the stairs for the trick, became impatient. They walked down the staircase, and at the doorway appellant exclaimed to Singleton that, in Singleton's words, "the fagot and [the] whore had copped the money from the trick and ran up the alley" (Tr. 121, 124). Appellant then conversed with the Indian, who was still there, and at appellant's request Singleton returned to the apartment to get appellant's black cashmere coat. Singleton soon reappeared in time to see appellant's left hand within two inches from Kane's chin, appearing to Singleton "as if it had struck, and just went by" (Tr. 152). At the same time Singleton saw Kane fall back-

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[4] The rear entrance to the building was on P Street near Fourteenth Street (Tr. 301).

[5] Singleton stated that a "trick" is somebody "white from the suburbs . . . looking for a woman" (Tr. 122-123).

[6] Singleton testified that he could never forget the hair because it was black and straight "like Daddy Grace's hair" (Tr. 143).

wards. The Indian's head hit the cement hard. Singleton froze and "squinched" when he heard the "thump" (Tr. 125-126, 151-156). Appellant then went through his victim's pockets, retrieved some change and said, "We going to find a whore and a fagot" (Tr. 125; see Tr. 158-161).

Soon thereafter they caught up with Nu Nu and DeVone on Corcoran Street. Although appellant pressed them for his share of the $20, they insisted that they did not get any money from the Indian. Appellant finally relented but cautioned them not to go back to the apartment, saying, "I hit the mother fucker and knocked him out, went through his pockets but all he had was sixty cents. . . . I left the mother fucker laying out there." (Tr. 249; see Tr. 129.) It was not until after 4:00 a.m. that Kane's body was discovered by Officer Willie Pope of the Metropolitan Police. The victim was removed by ambulance to a hospital, where he was pronounced dead (Tr. 111).

The Trial

At trial the government's key witness, Michael Singleton, recounted the events of March 6, including his witnessing the assault on the Indian by appellant, the Indian's fall to the pavement, and the subsequent theft of change from the Indian's pocket by appellant (Tr. 125, 144, 150-160). Eddie DeVone's testimony included his account of the taking the Indian's twenty dollars, and appellant's statements later that morning that he had hit the Indian and taken his change (Tr. 182-184, 223-224, 289).

Doctor Linwood L. Rayford, Chief Deputy Coroner of the District of Columbia, testified that his autopsy on the body of an Indian male, George Kane,[7] disclosed that death was caused by "increased intracranial pressure, secondary to acute subdural hemorrhage" (Tr. 206), "compatible with a blunt head trauma," a type of in-

[7] The identity of the body was stipulated (Tr. 116).

jury "where the blow was to the back of the head" as from a "fall striking . . . the exact back of the skull" (Tr. 206-207).

Appellant's testimony differed from the government's version of the events only on a few crucial points. Appellant stated that it was he who went to get his black cashmere coat from the fourth-floor apartment, leaving Singleton with the Indian at the doorway. When he returned, he did not see the Indian but heard Singleton say, "Come on, Jack, the police are coming" (Tr. 288). They both then ran to Corcoran Street. Appellant vigorously denied striking or robbing the decedent (Tr. 292).

ARGUMENT

I. A verdict of guilty of robbery and manslaughter and not guilty of felony murder, even if inconsistent, does not warrant reversal of the convictions.

(Tr. 446)

Appellant contends that the rule in *Dunn* v. *United States*[8] on inconsistent verdicts, which this Court has consistently followed,[9] should not be followed in this case, especially where the trial court's erroneous jury instructions and improper verdict form may have precipitated an inconsistent verdict. Specifically, appellant asserts that the trial judge should have made it clear to the jury that if they found the defendant guilty of robbery and not guilty of felony murder, they *must* then find the defendant not guilty of manslaughter. We submit that not only is the rule in *Dunn* still good law but, in addition, the trial court's instructions were clear and free from error.[10] Moreover, we urge that a verdict of not

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[8] 284 U.S. 390 (1932).

[9] *E.g.*, *United States* v. *Fox*, 140 U.S. App. D.C. 129, 433 F.2d 1235 (1970); *Jackson* v. *United States*, 114 U.S. App. D.C. 181, 313 F.2d 572 (1962).

[10] The court's entire challenged instruction is set out in the appendix, *infra*, pp. 11-16.

guilty of felony murder and guilty of manslaughter and robbery were not necessarily inconsistent.

In *Dunn* Justice Holmes spoke thus for the Court:

> Consistency in the verdict is not necessary. Each count of the indictment is regarded as if it was a separate indictment. 284 U.S. at 393.

This ruling was further explained in *United States* v. *Dotterweich*, 320 U.S. 277 (1943), where the Court said:

> Whether the jury's verdict was the result of carelessness or compromise . . . is immaterial. Juries may indulge in precisely such motives or vagaries. 320 U.S. at 279.

Inconsistent verdicts have been consistently permitted in every other federal circuit [11] as well as in this one. In *United States* v. *Fox*, *supra* note 9, the Court cited the support for inconsistent verdicts in all the federal circuits and noted that all that is required is "consistency within individual counts and an ample evidentiary base for conviction." 140 U.S. App. D.C. at 132 n.21, 433 F.2d at 1238 n.21. In *Jackson* v. *United States*, *supra* note 9, the Court explained that inconsistency in verdicts does not require reversal "even though the inconsistency can be explained by no rational considerations. The question for us is whether the convictions are con-

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[11] *Crespo* v. *United States*, 151 F.2d 44 (1st Cir. 1945), *cert. dismissed*, 327 U.S. 758 (1946); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967); *United States* v. *Cindrich*, 241 F.2d 54 (3d Cir. 1957); *United States* v. *Grous*, 394 F.2d 182 (4th Cir.), *cert. denied*, 393 U.S. 840 (1968); *Ehrlich* v. *United States*, 238 F.2d 481 (5th Cir. 1956); *United States* v. *Shipp*, 359 F.2d 185 (6th Cir.), *cert. denied*, 385 U.S. 903 (1966); *United States* v. *Hickey*, 360 F.2d 127 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *Canaday* v. *United States*, 354 F.2d 849 (8th Cir. 1966); *Bryson* v. *United States*, 238 F.2d 657 (9th Cir. 1956), *cert. denied*, 355 U.S. 817 (1957); *Speers* v. *United States*, 387 F.2d 698 (10th Cir. 1967).

sistent with the evidence." 114 U.S. App. D.C. at 184, 313 F.2d at 575.[12]

Faced with this unanimity of case law supporting inconsistent verdicts, appellant urges for the first time on appeal that the trial court's assertedly erroneous instructions and its use of an improper verdict form precipitated the inconsistent verdict. Appellant takes the position that a finding of guilty of robbery and not guilty of felony murder is necessarily a finding that appellant did not commit a homicide. This is, of course, not the case at all.

Initially we note that appellant did not object at trial but, on the contrary, expressed complete satisfaction with the court's instructions (Tr. 446).[13] Second, we maintain that as long as there was sufficient evidence of manslaughter, the verdict can stand. *See Fox, supra* note 9. But most importantly, we submit that appellant's position is untenable, since it assumes as a proven fact that the homicide, if committed at all, *must* have been committed while appellant was "perpetrating" the robbery. *See* 22 D.C. Code § 2401. Such an instruction would have improperly invaded the province of the jury as the fact-finder, for, as we shall discuss, the jury could have reasonably inferred from the evidence that the homi-

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[12] Appellant asserts that the *Jackson* theory is inconsistent with this Court's previous opinion in *Green* v. *United States*, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955). In *Green* the accused was charged with arson and felony murder. The trial court gave a lesser included instruction on second-degree murder, and the jury found the defendant guilty of second-degree murder and arson.

This Court's reversal of the second-degree murder conviction was not founded merely on the inconsistent verdicts, but was based on the fact that there was insufficient evidence in the record to support a conviction for second-degree murder. Thus, contrary to appellant's contention, *Green* is consistent with *Jackson*. *See Jackson* v. *United States*, 114 U.S. App. D.C. at 84 n.5, 313 F.2d at 575 n.5.

[13] Failure to object to an instruction as required by Rule 30, FED. R. CRIM. P., absent plain error, constitutes a waiver of any claimed instructional defect. *See Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

cide was not committed while appellant was perpetrating the robbery. The record discloses, moreover, that the jury was properly instructed on the elements of felony murder, manslaughter, and robbery. At appellant's request they were further instructed that they could not find the defendant guilty of felony murder unless they first found him guilty of robbery. See appendix, *infra*, p. 15. The Court's instructions were extensive, clear, and in harmony with the law in this jurisdiction.

In any event, the verdicts were not necessarily inconsistent. Convictions of manslaughter and robbery are not inconsistent with an acquittal of felony murder if the jury believes that the accused did not formulate the criminal intent to rob until after his victim had suffered the fatal injury. Had appellant first attempted to rob the decedent and then encountered resistance, whereby the Indian was knocked to the ground and fatally injured, appellant's contention that the verdicts were inconsistent might have more substance. However, on this record it was certainly not unreasonable for the jury to infer that the homicide was committed prior to, and independently of, the robbery. The verdicts need not be regarded as inconsistent at all. *Cf. United States* v. *Simpson*, D.C. Cir. No. 23,269, decided November 17, 1970.

II. There was sufficient evidence to sustain appellant's conviction of involuntary manslaughter.

(Tr. 124, 125, 150-151, 155-157, 219, 439)

Appellant contends that there was insufficient evidence of manslaughter to sustain his conviction. However, the evidence, when viewed in the light most favorable to the Government, certainly permitted a reasonable mind fairly to conclude guilt beyond a reasonable doubt. *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 381 U.S. 837 (1947).

The jury was instructed on the elements of involuntary manslaughter:

> In this case, manslaughter is the unintentional killing of a human being which occurred as a result of reckless conduct involving extreme danger of death or serious bodily injury, in which reckless conduct involves a gross deviation from the standard of conduct that a reasonable man would observe. (Tr. 439.)

This instruction comports with the principle that a manslaughter verdict may be predicated not only on a homicide intentionally committed at the time of mutual combat or occurring in passion or hot blood caused by adequate provication, but also on an unintentional killing resulting from recklessness. *See United States* v. *Dixon*, 135 U.S. App. D.C. 401, 419 F.2d 288 (1969) (Leventhal, J., concurring).

It was reasonable for the jury to infer from the evidence that since appellant conversed with the decedent for some moments before the assault, appellant was conscious of the Indian's inebriated state (Tr. 124, 150-151, 219). It was also reasonable for the jury to conclude from the evidence that appellant struck the damaging blow (Tr. 125) and that as a direct and proximate result the Indian fell backwards to the cement, incurring the fatal head injury (Tr. 155-157). Finally, appellant's conduct could reasonably have been considered by the jury as reckless in that a reasonable man would have realized that such conduct involved an extreme danger that the Indian's sudden fall to the pavement would result in serious bodily injury or death. Indeed, this Court has previously held that where a defendant struck a person who then fell to the sidewalk, striking his head on the concrete, and where several days later the injured person died as a result of the head injury, sufficient evidence existed for a conviction of manslaughter. *Williams* v. *United States*, 105 U.S. App. D.C. 348, 267 F.2d 625 (1959).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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APPENDIX

APPENDIX

The trial court instructed the jury in pertinent part as follows:

The first count, as you know, charges first degree murder—killing while perpetrating and attempting to perpetrate the crime of robbery. The second count charges manslaughter. Now, if you find that the Government has proved all of the essential elements of first degree murder beyond a reasonable doubt, that is the killing while perpetrating and attempting to perpetrate the crime of robbery, then your verdict on count one may be guilty. If your verdict is guilty on count one you will ignore the second count of this indictment. In other words, you don't consider the second count, manslaughter, at all. Manslaughter is considered a lesser-included offense. On the other hand, if you find that the Government has failed to prove all of the essential elements of first degree murder, killing while perpetrating and attempting to perpetrate the crime of robbery, your verdict on count one would be not guilty. You would then proceed to a consideration of Count Two, which is the lesser-included offense of manslaughter. You would also, in either event, carry on to a consideration of the third count of the indictment, which charges robbery. I will explain that, as I have indicated, a little more in detail later.

Title 22, Section 2401, of the District of Columbia Code, dealing with murder in the first degree, a killing while perpetrating certain crimes, reads, in pertinent part, as follows:

"Whoever being of sound memory and discretion kills another in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or attempting to perpetrate any arson as defined in cer-

tain sections of the code, rape, mayhem, robbery, kidnapping, et cetera, is guilty of murder in the first degree."

Section 2901, Title 22, dealing with robbery, reads, in pertinent part, as follows:—That is also in the District of Columbia Code.

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value is guilty of robbery."

Now, the essential elements of the offense of murder in the first degree (felony murder), each of which the Government must prove beyond a reasonable doubt, are as follows:

(1) That the defendant inflicted an injury or injuries on the deceased from which the deceased died.

(2) That the defendant did so while perpetrating or attempting to perpetrate the offense of—in this case—robbery.

It is not necessary that such a killing have been committed with the purpose and intent to do so by the defendant. Any killing, even if committed without purpose and intent to kill and even if accidental, is murder in the first degree if committed in the perpetration or attempt to perpetrate the offense of robbery.

In the event that you find the defendant guilty of murder in the first degree, it then becomes your duty to deliberate on the punishment which will be imposed upon him.

The law provides that the punishment for murder in the first degree shall be death by electrocution, unless by your unanimous vote you recommend life imprisonment; or unless, having determined by your unanimous vote the guilt of the defendant as charged, you are unable to agree as to punishment, in which event you are required to so inform the Court and the Court must thereupon impose either a sentence of death by electrocution or life imprisonment. Therefore, if you should

find the defendant guilty of murder in the first degree, you may do one of three things.

(1) Return a verdict of guilty of murder in the first degree, in which case the punishment shall be death by electrocution.

(2) Return a verdict of guilty of murder in the first degree, with a recommendation by your unanimous vote of life imprisonment, in which case the punishment shall be life imprisonment; or

(3) Return a verdict of guilty of murder in the first degree, with your report to the Court, if such is the fact, that you are unable to agree as to punishment, in which case the punishment shall be either death by electrocution or life imprisonment, as determined by the Court.

Now, I am going to give you in this case a verdict form which I shall explain to you in a little more detail later which will make that clearer, I believe.

In this case, manslaughter is the unintentional killing of a human being which occurred as a result of reckless conduct involving extreme danger of death or serious bodily injury, in which reckless conduct involves a gross deviation from the standard of conduct that a reasonable man would observe.

The essential elements of the offense of manslaughter, each of which the Government must prove beyond a reasonable doubt, are:

(1) That the defendant inflicted an injury or injuries upon the deceased from which the deceased did die.

(2) That the injury or injuries to the deceased resulted from reckless conduct by the defendant involving extreme danger to other persons and gross deviation from the standard of performance of a reasonable man.

To establish the first essential element, it is necessary that the defendant have inflicted an injury or injuries upon the deceased, and that the deceased died as a result of such injury or injuries.

To establish the second essential element, it is necessary to show:

(a) That the injury or injuries to the deceased resulted from acts or omissions on the part of the defendant, which acts or omissions were characterized by an extreme danger to or reckless disregard for human life.

(b) That it was reasonably foreseeable that the defendant's conduct would pose a threat of serious bodily injury or death to the deceased.

To determine the character of the defendant's acts, you should measure the conduct of the defendant against all of the existing circumstances. It is necessary that the Government prove beyond a reasonable doubt that the defendant was aware or should have been aware that his conduct was a threat to the life or lives of others. (Tr. 435-440.)

* * * *

The defendant Roy Thomas has been indicted in a three-count indictment charging him with the offenses of felony murder, manslaughter and robbery. The first count of the indictment charges him with the crime of murder while committing the offense of robbery. This is the same robbery which is the basis for the third count of the indictment. In order to convict the defendant Roy Thomas of the offense of felony murder, as set forth in count one of the indictment, you must unanimously agree that he is guilty of the crime of robbery, as set forth in count three. If you believe beyond a reasonable doubt that he is guilty of the offense of robbery, as listed in Count Three, then you may go on to consider whether he is guilty or not guilty of the crime of felony murder, as stated in Count One of the indictment. If, on the other hand, you do not find him guilty of the robbery as listed in Count Three of the indictment, then you must find the defendant not guilty of the crime of felony murder listed in Count One of the indictment.

In other words, ladies and gentlemen, one of the essential elements, as I have indicated to you, of felony

murder is that the deceased was killed while the defendant was perpetrating or attempting to perpetrate a felony. So that the robbery is an essential element of Count One, the robbery contained in Count Three.

Will counsel come to the bench, please.

(AT THE BENCH)

MR. HIBEY: Your Honor, in the context of that last instruction, if you would simply say if they find him not guilty of robbery then they must find him not guilty of felony murder and then must consider Count Two.

MR. ROSEN: Outside of that, we are satisfied.

MR. HIBEY: Then I am satisfied.

(IN OPEN COURT)

THE COURT: Members of the jury, if you find that the defendant did not commit the robbery in Count Three of the indictment, then, as I have indicated, your verdict on Count One, the felony murder, would be not guilty; and then you would proceed to a consideration of the second count, which is the manslaughter.

At this time I will try to explain to you the verdict form which you will take to the jury room with you. When you see this form I as sure it will be much clearer to you. It reads as follows:

"Count One: Felony Murder."

And you have four blocks where your foreman can check whatever your appropriate verdict may be.

The first is "Guilty. The jury unanimously recommends that the penalty of death be imposed."

The second block is "Guilty. The jury unanimously recommends that the penalty of life imprisonment be imposed."

The third is "Guilty. The jury is unable to agree upon a recommendation for punishment."

And the fourth is "Not Guilty."

"Count Two: Manslaughter." And you have two choices there, either guilty or not guilty. As I have indi-

cated previously, you will only consider Count Two if your finding on Count One, Felony Murder, is not guilty. If your finding is guilty on Count One you will not consider the second count of Manslaughter. But if your finding is not guilty on Count One you do consider the charge of Manslaughter.

The Third Count is "Robbery" and you have two choices there. There is a block for either guilty or not guilty, depending on your verdict. (Tr. 445-448.)

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